

Case Comments

Northern Indiana Public Service Company v. Carbon County Coal Company: Risk Assumption in Claims of Impossibility, Impracticability, and Frustration of Purpose

While Anglo-American law steadfastly adheres to the principle that individuals should enjoy full freedom to contract, courts have nonetheless recognized that absolute enforcement of contractual obligation is not always desirable. For example, parties seeking enforcement of a previously agreed upon contractual provision will be unable to resort to judicial intervention should the subject matter of their contract be illegal.¹ Agreements may be similarly void or voidable if made between minors or between minors and persons who have reached majority.² Generally, judicial rejection of these contracts creates little disagreement.

Dispute, however, does arise when courts set aside obligations solely because exceptional events occur after contract formation. Events that defeat all potential methods of contract performance may insulate a party from a suit for damages or specific performance since compliance would be impossible.³ Should the entire purpose of the contract be subverted by a later occurrence, the defense of frustration of purpose may also apply.⁴ Finally, if events that take place after contract formation dramatically increase the costs of performance, relief from liability may be effected through the defense known as commercial impracticability.⁵

An opportunity to explore the impossibility, frustration of purpose, and commercial impracticability defenses arose in 1986, when the United States Court of Appeals for the Seventh Circuit refused to set aside a long-term contract executed in 1978 between Northern Indiana Public Service Company (NIPSCO), a utility, and its coal supplier, Carbon County Coal Company (Carbon County).⁶ The buyer had brought suit claiming that it should be excused from its obligations under a twenty-year contract specifying that NIPSCO would buy and Carbon County would sell approximately 1.5 million tons of coal each year.⁷ The contract's twenty-four dollars

1. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 7 (1979).

2. See, e.g., *id.* § 8 (1979).

3. Impossible performance might result when a party to a personal services contract has died or when the subject matter of a contract has been destroyed. See, e.g., *id.* §§ 261–63.

4. Restatement (Second) of Contracts § 265, “Discharge by Supervening Frustration,” states:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Id. § 265.

5. Restatement (Second) of Contracts § 261, “Discharge by Supervening Impracticability,” states:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id. § 261.

6. Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986) (*NIPSCO*).

7. *Id.* at 265–66.

per ton price was subject to escalation provisions; in accordance with the terms of the agreement, the price rose to forty-four dollars per ton by 1985.⁸ When the court denied NIPSCO permission to pass the increased price of the utility's coal onto customers, NIPSCO sought release from its contract with Carbon County. NIPSCO alleged that its performance was excused under doctrines of impossibility, impracticability, and frustration of purpose.⁹

Judge Posner, writing for the court, completely rejected NIPSCO's claim.¹⁰ In so doing, he reflected American judicial aversion to excusing voluntarily assumed obligations after superseding events render performance onerous.¹¹ The *NIPSCO* decision appropriately suggested that the Uniform Commercial Code's impracticability provision, section 2-615,¹² applies to buyers as well as to sellers.¹³ Moreover, although Judge Posner concluded that the utility's failure to negotiate for a price ceiling in its contract conclusively assigned to NIPSCO any risk of inflated costs,¹⁴ the result

8. *Id.* at 267.

9. *Id.* at 267-68.

10. *Id.* at 277-78.

11. See, e.g., *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (contract for the sale of potash enforced although the seller's performance was made economically burdensome due to government regulation); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (obligation to deliver goods to buyer using alternate, more costly route was not excused); *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966) (computer supplier was not excused from contract although the corporation encountered engineering problems after the formation of its contract); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440 (E.D. Va. 1981) (corporation's unqualified obligation to dispose of waste was not excused although severe losses resulted from reversal of government policy regarding nuclear waste disposal); *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258 (S.D.N.Y. 1978) (performance was not excused although financial difficulty and economic hardship, even to the point of insolvency, made performance difficult or impossible), *aff'd*, 601 F.2d 609 (2d Cir. 1979); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975) (increase in cost of aviation fuel to supplier did not excuse its performance under a long-term supply contract with airline); *Publicker Indus. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975) (performance of contract to supply "Spirits Grade Ethanol" was not excused although there was almost a 50% increase in the cost of performance); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App.) (coal supplier required to perform as specified in requirements contract although energy shortage drastically increased the cost of supplier's performance), *cert. denied*, 441 U.S. 865 (1979); *Maple Farms v. City School Dist. of Elmira*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (fixed price contract for the sale of milk was not set aside although supplier's cost was subject to market fluctuations). Compare *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) (*ALCOA*) (relief granted to producer of aluminum when contract price failed to reflect the increased costs of aluminum manufacturing and loss was alleged to be over \$60 million) with *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916) (obligation released when cost of production would be 10 to 12 times the specified contract price).

12. U.C.C. § 2-615, "Excuse by Failure of Presupposed Conditions," states:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

U.C.C. § 2-615 (1978). [The Uniform Commercial Code will hereinafter be referred to as the U.C.C. or the UCC].

13. *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 277-78 (7th Cir. 1986). See *infra* note 43.

14. *Id.* at 275.

reached is nonetheless consistent with case law¹⁵ and the Restatement of Contracts.¹⁶ The Restatement's position suggests that the impracticability defense should be available when an event, the nonoccurrence of which was a basic assumption on which the contract was made, occurs subsequent to the contract's formation and renders the party's performance impracticable.¹⁷ The Restatement also indicates that where either the contract language or the circumstances indicate the contrary, or where the contingency's occurrence is the fault of one of the parties, a defense premised on impracticability will not lie.¹⁸

This Note will introduce the impossibility, impracticability, and frustration of purpose defenses. It will then describe the circumstances giving rise to the *NIPSCO* dispute and will explore the implications of the Seventh Circuit's decision. Greatest attention will be paid, however, to the manner in which the *NIPSCO* court limited its review to the nature of the contract and to the contract's price terms.¹⁹

Specifically, this Note suggests that the Seventh Circuit's refusal to consider the totality of circumstances surrounding negotiation may discourage the formation of agreements. A court's limited factual inquiry to ascertain the assignment of certain risks may require parties to insist upon protective contractual clauses to excuse performance should any remote event take place. Conversely, courts may be free to deny impossibility and related defenses on the sole ground that the omission of an exculpatory provision constituted an implicit assumption of risk. Ultimately, individuals may be deterred from entering into obligations in which the contracting environment is inherently complex or changing.

This Note contends that an analysis of the totality of circumstances surrounding

15. See generally Birmingham, *A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory*, 20 HASTINGS L.J. 1393 (1969); Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1 (1984); Duesenberg, "Impossibility": *It Isn't Good Code Language*, 1 J.L. & COM. 29 (1981), reprinted in 24 Corp. Prac. Comm. (Callaghan) 1 (1982); Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985); Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 WIS. L. REV. 527; Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "the Wisdom of Solomon"*, 135 U. PA. L. REV. 1123 (1987); Jennings, *Commercial Impracticability—Does It Really Exist?*, 2 WHITTIER L. REV. 241 (1980); Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1977); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977); Prance, *Commercial Impracticability: A Textual and Economic Analysis of Section 2-615 of the Uniform Commercial Code*, 19 IND. L. REV. 457 (1986); Schwarz, *Sales Law and Inflation*, 50 S. CAL. L. REV. 1 (1976); Sirianni, *The Developing Law of Contractual Impracticability and Impossibility*, 14 U.C.C. L.J. 30, 146 (parts 1 & 2) (1981); Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985); Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 NOTRE DAME L. REV. 203 (1979); Note, *U.C.C. § 2-615: Excusing the Impracticable*, 60 B.U.L. REV. 575 (1980) (authored by John Gerald Ryan) [hereinafter *Excusing the Impracticable*]; Note, *Court-Imposed Modifications: Supplementing the All-or-Nothing Approach to Discharge Cases*, 44 OHIO ST. L.J. 1079 (1983) (authored by Robert W. Reeder III) [hereinafter *Court-Imposed Modifications*]; Comment, *Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective*, 51 TEMP. L.Q. 518 (1978) (authored by Arthur Nakazato) [hereinafter *Commercial Impracticability*].

16. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979).

17. *Id.* § 261 and comment c.

18. *Id.* § 261 and comment d.

19. This Note does not attempt to identify under what general circumstances an encumbered promisor ought to be relieved of contractual obligation because of impossibility, impracticability, or frustration of purpose. Instead, the discussion focuses on what facts should be relevant to a court's determination that particular risks have been assumed, the consequence of which is the unavailability of those defenses to a particular party.

the parties at contract formation should control whether the participants intended performance, notwithstanding the effects of ensuing events. While arguably this approach requires additional judicial resources, any associated costs are substantially outweighed by the benefits of a totality of circumstances test. Consideration of the entire contracting environment accurately reflects economic reality embracing contract formation and enables courts to determine what, in fact, parties intended by their agreement.

I. IMPOSSIBILITY, FRUSTRATION OF PURPOSE, AND COMMERCIAL IMPRACTICABILITY

Over the past 300 years, courts have drastically altered the way in which they view the promise to perform under contract. Excuse from contractual obligation based upon impossibility was originally limited to cases in which performance by the promisor was rendered physically impossible.²⁰ Because of the severe judicial requirement that only express provisions in the contract might provide relief from obligation, parties sought to avoid oppressive performance by incorporating *force majeure* clauses in their contracts to excuse either the buyer's or the seller's performance should certain episodes occur, such as acts of God or acts of law.²¹ However, the *force majeure* clause could only guard against those events that were

20. Strict adherence to contractual obligation is best illustrated by the English case *Paradine v. Jane*, 82 Eng. Rep. 897 (K.B. 1647), in which a lessee was required to pay rent under a lease contract although a hostile army occupied the building and the lessee was unable to use the property. The court declared that "[w]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Id.* at 897.

Courts recognize the defense of impossibility in those cases in which "performance itself is made impracticable, without regard to the particular party who is to perform." This practice is known as the recognition of "objective," rather than "subjective," impossibility. RESTATEMENT (SECOND) OF CONTRACTS § 261 comment c (1979). *See, e.g., B's Co. v. B.P. Barber & Assocs.*, 391 F.2d 130 (4th Cir. 1968) (in which impossibility personal to the promisor did not excuse performance); *Harris v. Waikane Corp.*, 484 F. Supp. 372 (D. Haw. 1980) (court stating that objective impossibility will usually be required); *Slaughter v. C.I.T. Corp.*, 229 Ala. 411, 157 So. 463 (1934) (delay in payment of debt not excused although delay due to bank's folding during economic depression). *But see Alabama Football v. Wright*, 452 F. Supp. 182 (N.D. Tex. 1977) (failure of business enterprise released entity from payment of salary due), *aff'd*, 607 F.2d 1004 (5th Cir. 1979).

21. "Such clause[s] [are] common in . . . contracts to protect parties in the event that a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care." BLACK'S LAW DICTIONARY 581 (5th ed. 1979).

A typical *force majeure* clause may appear as:

If either party is rendered unable by force majeure, or any other cause of any kind not reasonably within its control, wholly or in part, to perform or comply with any obligation or condition of this Agreement, upon such party's giving timely notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided obligations to make payments then due for products delivered hereunder shall not be suspended. The cause of the suspension (other than strikes or differences with workmen) shall be remedied so far as possible with reasonable dispatch. Settlement of strikes or differences with workmen shall be wholly within the discretion of the party having the difficulty. The party having the difficulty shall notify the other party of any change in circumstances giving rise to the suspension of its performance and of its resumption of performance under this Agreement. The term "force majeure" shall include, without limitation by the following enumeration, acts of God, and the public enemy, the elements, fire, accidents, breakdowns, strikes, differences with workmen, and any other industrial, civil or public disturbance, or any act or omission beyond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations or acts of any government or governmental body or authority, civil or military.

Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327, 1329 n.1 (4th Cir.), *cert. denied*, 108 S. Ct. 99 (1987).

sufficiently foreseeable; it was incapable of protecting parties from events that were so unlikely to take place that they were not specified in the exculpatory provision. The judiciary responded by implying conditions to performance that the courts felt were embraced by the nature of the contract.²² The failure of these conditions would in turn represent a defense to contract available to either a buyer or a seller.²³ It followed from application of this implied-condition principle that the death of a party to a personal services contract or the destruction of a contract's subject matter excused performance.²⁴ The bases for an implied-condition excuse were few, however, and the impossibility claim remained of relatively scarce applicability. American courts dramatically liberalized the theory of impossibility in *Mineral Park Land Co. v. Howard*,²⁵ in which the buyer's performance of a contract to excavate gravel was physically possible, but only at a cost to him of ten to twelve times the agreed contract price. The court's finding that the commercial impracticability due to this aggravated cost amounted to impossibility and therefore excused performance²⁶ was later adopted by the Restatement and incorporated into UCC section 2-615.²⁷

Consistent with the liberalization of impossibility defenses found in *Mineral Park*, contemporary application of the defenses was not limited to sellers. Indeed, the frustration of purpose doctrine evolved to afford particular protection to buyers. Frustration of purpose implies that while performance is possible, contractual obligation will nevertheless be extinguished if the purpose of the contract has been defeated.²⁸ Since payment for goods or services is rarely an obligation that is objectively impossible or one that becomes burdensome enough to constitute

22. For a brief discussion of these implied conditions, see Jennings, *supra* note 15.

23. The doctrine of implied conditions had its genesis in the English case *Taylor v. Caldwell*, 122 Eng. Rep. 309 (Q.B. 1863), in which the destruction of a theater after the defendant had procured its use for the purpose of giving concerts relieved the defendant from his obligation to pay rent. In this case, the court stated:

The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of the cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.

Id. at 314. The implied condition principle had also been adopted in America by 1883, see, e.g., *The Tornado*, 108 U.S. 342, 351 (1883), yet some commentators still express dissatisfaction with the implied-condition theory. See, e.g., 6 A. CORBIN, CORBIN ON CONTRACTS § 1331, at 355-61 (1962); 18 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1937, at 32-35 (3d ed. 1978).

24. RESTATEMENT (SECOND) OF CONTRACTS §§ 262-63 (1979).

25. 172 Cal. 289, 156 P. 458 (1916).

26. *Id.* at 293, 156 P. at 460 ("A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.").

27. The impracticability defense is incorporated in Restatement (Second) of Contracts § 261 and in U.C.C. § 2-615. See *supra* notes 5 & 12.

28. The Coronation case provides the classic example of frustration. In *Krell v. Henry* [1903] 2 K.B. 740 (C.A.), a lessee was released from his obligation to pay rent for a room he had leased to watch a parade for King Edward VII. When the King became ill and the parade was canceled, the lessee was not required to perform under his contract. The court found that where the object of the contract perishes at or before the time for performance, the purpose of the contract is frustrated, and the promisor is relieved from his obligation. *Id.* at 749-50. A recent example of an American court's application of frustration may be found in *West Los Angeles Institute for Cancer Research v. Mayer*, 366 F.2d 220, 225 (9th Cir. 1966) (where the purpose of a sale-leaseback agreement was to avoid tax expense and after contract formation the tax code was changed so that any tax benefit from the transaction was lost, the obligation was discharged), *cert. denied*, 385 U.S. 1010 (1967).

impracticability, frustration may be a particularly useful defense to a buyer whose only contractual obligation is tendering payment. Similar to the doctrines of impossibility and impracticability, the frustration of purpose defense is conditioned upon the occurrence of an event the nonoccurrence of which was a basic assumption of the contract.²⁹ Applying the frustration doctrine in *Aluminum Co. of America v. Essex Group, Inc. (ALCOA)*,³⁰ a district court held that performance was excused because a continuation of the contractual relationship would have otherwise resulted in extreme losses to the buyer.³¹ The buyer successfully asserted that the primary purpose of the disputed contract was to procure profits.³² Agreeing that unprofitability had frustrated the buyer's principal purpose, the court allowed the frustration of purpose defense and released the buyer from further obligation. The precedential use of *ALCOA* is indeterminable because the case has not yet been followed; however, the holding does suggest a particularly expansive application of the frustration of purpose defense.

Much case law clarifying the impossibility, impracticability, and frustration doctrines reiterates the requirement of severe loss, the risk of which the party seeking release did not assume.³³ Generally, increases in the cost of performance less extreme than those that occurred in *Mineral Park* will not satisfy the requirements of any of these defenses, even when huge aggregate losses have been demonstrated.³⁴ Moreover, courts look to alternative means of performance by the parties to determine if the burden of performance is sufficiently onerous, creating an additional hurdle to the formation of a successful claim.³⁵

29. See *supra* note 4. See also *Columbian Nat'l Title Ins. Co. v. Township Title Servs., Inc.*, 659 F. Supp. 796 (D. Kan. 1987) (refusing to grant relief although purpose of contract frustrated, because frustrating event was both foreseeable and controllable by the parties); *Denali Seafoods, Inc. v. Western Pioneer, Inc.*, 492 F. Supp. 580 (W.D. Wash. 1980) (disallowing frustration of purpose defense because frustrating event was not an unexpected contingency and because contract provisions relating to maintenance, repair, and insurance constituted express and implied assumptions of risk).

30. 499 F. Supp. 53 (W.D. Pa. 1980).

31. *Id.* at 73.

32. *Id.* When ALCOA's contract became unprofitable due to increased costs that were passed to the buyer, the contract's purpose was frustrated and ALCOA was released. As of the publication of this Note, the district court's application of commercial frustration has not been followed in any other reported decision.

33. See, e.g., *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (additional expense of \$44,000 to perform shipping contract was not enough to constitute impracticability); *Printing Indus. Ass'n v. International Printing Local 56*, 584 F. Supp. 990 (N.D. Ohio 1984) (multiemployer bargaining association, asking for judicial reformation of union contract, did not assert an actionable frustration of purpose claim when the association's possible losses represented less than 6% of total wages payable under contract); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440 (E.D. Va. 1981) (losses in excess of \$100 million did not excuse performance); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975) (cost increase greater than 40% in raw material over life of contract did not constitute impracticability); *Publicker Indus. v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975) (nearly 50% increase in cost of performance was insufficient to justify impracticability defense); *Maple Farms v. City School Dist. of Elmira*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (23% increase in the cost of performance was insufficient to discharge performance). Cf. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916) (cost of performance greater than 10 to 12 times the contract price excused performance). See also E. FARNSWORTH, *CONTRACTS* §§ 9.6-9.9, at 681-705 (1982).

34. Compare *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (obligation was not excused although increase in cost of raw material to supplier was over \$100,000); *Westinghouse 517 F. Supp. 440* (losses in excess of \$100 million did not excuse performance); *Publicker*, 17 U.C.C. Rep. Serv. (Callaghan) 989 (losses in excess of \$1.5 million not sufficient to invoke impracticability defense) with *ALCOA*, 499 F. Supp. 53 (alleged losses in excess of \$60 million were relevant to finding impracticability requirement met).

35. See, e.g., *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 409 (Ct. Cl. 1978) (defense of commercial

Overall, the origin and development of the impossibility, impracticability, and frustration doctrines suggest potentially absolute protection from unfortunate subsequent events, but protection that remains relatively unavailable to buyers and sellers. This brief synopsis of the impossibility, impracticability, and frustration contract defenses will be helpful to the following exposition of the *NIPSCO* dispute³⁶ and discussion of the Seventh Circuit's response to NIPSCO's commercial impracticability claim.

II. THE *NIPSCO* DISPUTE

In 1978 NIPSCO and Carbon County entered into an agreement whereby NIPSCO would purchase and Carbon County would sell approximately 1.5 million tons of coal each year for twenty years.³⁷ By the mid-1970s, fuel prices had skyrocketed as a result of the recent oil embargo and companies like NIPSCO were eager to guarantee long-term accessibility to energy supplies.³⁸ Contracts evidencing this eagerness might be expected to provide price escalation provisions; purchasers and suppliers were then acutely aware of the upward movement of energy prices and orchestrated contract negotiations accordingly. When fuel prices suddenly plummeted, however, those parties who had initially contracted in an environment of ever-increasing fuel costs were often burdened with agreements that addressed only an anticipated *rise* in supply costs.

NIPSCO's Carbon County contract contained an escalation provision as an accommodation to expected increasing fuel prices. In accordance with the escalation clause, NIPSCO's cost of coal rose from an initial twenty-four dollars per ton to forty-four dollars per ton by 1985.³⁹ Ultimately, NIPSCO sought to pass to customers the increased cost of coal it used to generate electricity. The regulatory commission refused the requested rate increases, however, citing the availability of electricity that NIPSCO could purchase and resell to customers for less than the cost of internal production.⁴⁰

Thereafter, NIPSCO brought suit for relief from the Carbon County contract in federal district court claiming, among others, the defenses of impossibility, impracticability, and frustration of purpose.⁴¹ Upon the district court's holding for Carbon County, NIPSCO appealed the unfavorable decision. The Seventh Circuit, however,

impracticability disallowed after court noted that the defense could be "utilized only when the promisor [had] exhausted all its alternatives, when in fact it is determined that all means of performance are commercially senseless"); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (although the assumed method of performance, sailing through the Suez Canal, was rendered impossible, an alternate and much more costly route around Cape of Good Hope was possible so performance was not excused). *But cf.* *Northern Corp. v. Chugach Elec. Ass'n*, 518 P.2d 76 (Alaska), *modified on reh'g*, 523 P.2d 1243 (Alaska 1974) (icy conditions made delivery across frozen lake impossible and, although an alternate route was possible, the alternative had not been contemplated by parties and was not chargeable to the promisor), *aff'd*, 562 P.2d 1053 (Alaska 1977).

36. *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986).

37. *Id.* at 265-66.

38. *Id.* See also *Mastery Over World Oil Supply Shifts to Producing Countries*, N.Y. Times, Apr. 16, 1973, at 1, col. 1.

39. *NIPSCO*, 799 F.2d at 267.

40. *Id.*

41. *Id.* at 268.

affirmed the lower court's judgment.⁴² Judge Posner's circuit court opinion discussed the likelihood that impossibility defenses would be available to buyers under Indiana law⁴³ but nevertheless held that NIPSCO failed to plead proper excuse by *force majeure*⁴⁴ or by impossibility.⁴⁵

The Seventh Circuit's treatment of NIPSCO's impossibility defense was straightforward: because the contract by its own terms fixed prices the buyer would pay, it explicitly assigned to the buyer *any* risk of price increases.⁴⁶ Risk assumption

42. *Id.*

43. While the district court in *NIPSCO* maintained that a buyer could not claim impossibility defenses under Indiana's commercial statutes, Judge Posner suggested in dicta that buyers should receive such protection. *NIPSCO*, 799 F.2d at 277-78. Indiana's code, identical to UCC § 2-615, "Excuse by Failure of Presupposed Conditions," does not mention applicability of the impossibility, impracticability, or frustration of purpose defenses to the buyer; however, there is ample evidence to support Judge Posner's conclusion that buyers should nevertheless benefit from the statute. IND. CODE ANN. § 26-1-2-615 (West Supp. 1988-89). Case law that the Code sought to embody never distinguished between the buyer and the seller in application of these defenses. See *supra* Part I. Instead, the statute was enacted to "liberate the courts from the old restrictive concepts of excuse." *Commercial Impracticability*, *supra* note 15, at 533. See also Wallach, *supra* note 15, at 212-13. Karl Llewellyn, principal drafter of Article 2 of the UCC, noted an intent to liberate the doctrines of impossibility, impracticability, and frustration of purpose. Prance, *supra* note 15, at 459 n.4.

Indeed, the UCC's comment 9 to § 2-615 suggests that the defense of commercial impracticability should be available to the buyer, stating that "the present section may well apply and entitle the buyer to the exemption." U.C.C. § 2-615 comment 9 (1978). The Permanent Editorial Board does not support similar amendments since it believes § 2-615 may already be read to include excuse when appropriate. *Commercial Impracticability*, *supra* note 15, at 521-22 n.9. Mississippi, for example, recognized the sensibility of allowing buyers protection under its § 2-615 and expressly stated in its statutes that buyers are entitled to the § 2-615 defense. MISS. CODE ANN. § 75-2-615 (1972). Similarly, the Iowa Supreme Court in *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744 (Iowa 1976), indicated that impracticability claims should be available to buyers. See also *Lawrance v. Elmore Bean Warehouse, Inc.*, 108 Idaho 892, 894, 702 P.2d 930, 932 (Ct. App. 1985); *Northern Ill. Gas Co. v. Energy Coop.*, 122 Ill. App. 3d 940, 953-56, 461 N.E.2d 1049, 1060 (1984) (indicating the defense should be available to the buyer). Parallel statutes, however, have been construed as not extending § 2-615 protection to buyers. See *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).

Nevertheless, in light of the historical background of the excuse doctrines and the intent of UCC § 2-615 to loosen the strict requirements of impossibility and impracticability, it is unlikely that the Indiana statute was drafted with the intention to limit its application to sellers. While Indiana does not expressly extend the benefits of UCC § 2-615 to buyers, Indiana Code § 26-1-1-103 authorizes "the principles of law and equity [to] supplement [the Code's] provisions." IND. CODE ANN. § 26-1-1-103 (West Supp. 1988-89). However, Indiana's own official comments "seem critical of [U.C.C.] comment 9: 'Comment 9 discusses exemption for the buyer, but the text of the section is applicable only to sellers.'" IND. CODE ANN. § 26-1-2-615, *quoted in NIPSCO*, 799 F.2d at 277. Notwithstanding the Indiana comment, allowing buyers the defenses articulated under § 2-615 would balance the expansion of the doctrine that has already benefited sellers and ultimately effect the purposes of the Code.

44. *NIPSCO*, 799 F.2d at 277-78. The *force majeure* clause stated that NIPSCO would be relieved of its obligation to take delivery of coal "for any cause beyond [its] reasonable control . . . including but not limited to . . . orders or acts of civil . . . authority . . . which wholly or partly prevent . . . the utilizing of the coal." *Id.* at 274.

Judge Posner dismissed NIPSCO's argument that its *force majeure* clause excused performance, recognizing that neither the utility commission's order nor market fluctuations were covered by the exculpatory provision. *Id.* at 275, 278. There had been no order by the commission not to take delivery of Carbon County's coal; the order only refused to allow NIPSCO to pass the additional cost to customers. Moreover, Judge Posner added that "[b]y signing the kind of contract it did, NIPSCO gambled that fuel costs would rise rather than fall over the life of the contract If such a gamble fails, the result is not *force majeure*." *Id.* at 275. Other courts have also refused to classify similar market activities as *force majeure*. In *Langham-Hill Petro. Co. v. Southern Fuels Co.*, 813 F.2d 1327 (4th Cir.), *cert. denied*, 108 S. Ct. 99 (1987), the court of appeals affirmed the dismissal of defendant's claim that a collapse in oil prices, caused by Saudi Arabian attempts to regain market share, constituted *force majeure* and relieved the defendant of contractual obligation. The appellate court also supported a sanction of attorney's fees against the defendant because the defendant had asserted a claim that the court felt was "not warranted by existing law." *Id.* at 1330. A discussion of *force majeure* clauses and UCC § 2-615 may be found in Wallach, *supra* note 15, at 221-24.

45. *NIPSCO*, 799 F.2d at 275.

46. *Id.* at 278. Judge Posner described the operation of fixed-price contracts: The normal risk of a fixed-price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller (except insofar as escalation provisions give the seller some protection); if it falls, as here,

was thus conclusively presumed by both the terms and the nature of the parties' agreement. Interpreting the contract in this way effectively precluded NIPSCO from claiming impossibility, impracticability, or frustration since those defenses require that the pleading party not have assumed the risk of an otherwise excusing event.⁴⁷

The decision ultimately reached in *NIPSCO* may have been appropriate under the facts of that case; however, the court's use of a conclusive presumption to assign the risk of loss may not be wise. The remaining discussion addresses court-determined assumption of risk and suggests that a totality of circumstances test is appropriate in the resolution of impossibility claims.

III. THE IMPORTANCE OF ASSUMPTION OF RISK AND THE NEED FOR A TOTALITY OF CIRCUMSTANCES TEST

A. Assumption of Risk

The U.C.C.'s and Restatement's impossibility, impracticability, and frustration of purpose provisions all condition excuse on the failure to find certain risks assumed by the parties. If an obligor has implicitly or explicitly assumed the risk of a contingency the nonoccurrence of which was a basic assumption of the parties, his claim will fail.⁴⁸ To determine if a party otherwise has assumed the risk of a superseding event, courts have looked to a number of criteria: the nature and purpose of the contract,⁴⁹ the bargaining process,⁵⁰ the ability to bear risk,⁵¹ and, most notably, the foreseeability of the aggravating event.⁵²

the seller gains at the expense of the buyer. *The whole purpose of a fixed-price contract is to allocate risk this way.*

Id. (emphasis added).

The Fourth Circuit Court of Appeals found Judge Posner's reasoning convincing and concluded that fixed-price contracts constitute explicit assignments of risk. *Langham-Hill*, 813 F.2d at 1330 ("If fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated."), *cert. denied*, 108 S. Ct. 99 (1987).

47. For a discussion of the utility of the court's conclusive presumption, see Part III, *infra*.

48. For example, both the Restatement and the U.C.C. condition impracticability and frustration of purpose claims on the claiming party's failure to have assumed, explicitly or implicitly, risks of subsequent contingencies. RESTATEMENT (SECOND) OF CONTRACTS § 261 comment c, § 265 comment a (1978). See also U.C.C. § 2-615 comment 8.

49. See, e.g., *Maple Farms v. City School Dist. of Elmira*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974) (fixed-price contract expressly entered into by buyer to protect buyer from market fluctuations).

50. See, e.g., *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944) (foreseeable contingency should have been provided for in contract, so absence of a provision guarding against the contingency gave rise to the inference that the risk of its occurrence was assumed). See *infra* notes 54-55 and accompanying text.

See also comment 8 to U.C.C. § 2-615:

Thus, the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. . . .

U.C.C. § 2-615 comment 8 (1978).

51. Judge Posner discusses the ability both to foresee and to control risk as determinative factors in allowing parties to claim impracticability. Posner & Rosenfield, *supra* note 15. See also *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 179 N.E. 383 (1932) (because middleman could have protected against the contingency that certain suppliers would close had he contracted with other suppliers for conditional purchase of goods, impracticability was disallowed); *Arnold v. Ray Charles Enter.*, 264 N.C. 92, 141 S.E.2d 14 (1965) (defendant's control over airplane and ability to prevent its malfunction defeated impossibility claim).

52. See, e.g., *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (government

When contracts are specifically designed to insulate parties from the risk of an event, it is understandable that courts refuse to set aside the agreement merely because circumstances arise that bear out the purpose of the contract. Thus, for example, when a school district specifically sought protection from market fluctuations by entering into a fixed price purchase agreement with a milk supplier, the court estopped the seller from asserting that increased costs of supply made performance commercially impracticable.⁵³ Courts have also examined the bargaining process of particular claimants who later assert excusing defenses to their contracts. In *Scullin Steel Co. v. PACCAR, Inc.*,⁵⁴ the defendant in a suit for breach had originally tried to include an excusing clause in its contract during negotiations, but failed. Because of this fruitless bargaining at contract formation, the court would not relieve the defendant from obligation under its final agreement. Instead, the court extrapolated from the omission of an excusing provision the parties' intent *not* to release obligation under certain circumstances.⁵⁵

Impossibility and commercial impracticability claims have also been rejected when the party seeking excuse was best able to bear the risk of loss due to an event's occurrence.⁵⁶ Judge Posner suggests that "[i]n every discharge case the basic problem is the same: *to decide who should bear the loss* resulting from an event that has rendered performance by one party uneconomical."⁵⁷ Judge Posner characterizes the superior risk bearer as the party who can estimate both the magnitude and the probability of loss and who can insure against exposure.⁵⁸ A classic application of risk-bearing analysis resulted in the disallowance of impossibility defenses to a "middleman" who could have contracted with other suppliers for the conditional purchase of goods, thereby protecting himself from the hazard of a supplier's nonperformance.⁵⁹ Because the "middleman" had been contributorily negligent in failing to guard against subsequent nondelivery by suppliers, his impossibility and impracticability claims were rejected.

The foreseeability of specific contingencies similarly has been a crucial factor in many cases addressing assumption of risk and impossibility.⁶⁰ While it is not necessarily required by U.C.C. section 2-615 that an excusing contingency be

regulation sufficiently foreseeable to deny excuse); *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966) (engineering problems foreseeable in construction of an innovative computer system so claim of impracticability disallowed); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975) (foreseeability of fuel crisis sufficient to defeat impracticability claim); *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363 (1974) (labor strike was foreseeable so its occurrence could not constitute an event upon which an impracticability claim could be founded); *Maple Farms*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (change in price of milk supply foreseeable and therefore could not be foundation of impracticability defense). See also U.C.C. § 2-615 comment 8 (1978).

53. *Maple Farms*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784. Judge Posner's *NIPSCO* decision similarly viewed the utility's coal contract. See *supra* note 46.

54. 708 S.W.2d 756 (Mo. Ct. App. 1986), *appeal after remand*, 748 S.W.2d 910 (Mo. Ct. App. 1988).

55. *Id.* at 762. The *Scullin* court refused to allow a frustration defense, finding that both the "language and the circumstances . . . indicate[d]" that discharge was not intended by the parties. *Id.*

56. See *supra* note 51.

57. Posner & Rosenfield, *supra* note 15, at 86 (emphasis added).

58. *Id.* at 117.

59. See *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194, 179 N.E. 383 (1932).

60. See *supra* note 52.

unforeseeable,⁶¹ foreseeability's relevance is based on the simple theory that the "non-occurrence of a contingency cannot be fairly said to be a basic assumption of the parties if its occurrence was foreseeable."⁶² While the Restatement's drafters recognized that foreseeability may be probative of a party's intent, the comments to the impracticability section do not view foreseeability as conclusive.⁶³ Nevertheless, courts have maintained that when a contingency was foreseeable or should have been contemplated by the parties, the risk of its occurrence falls on that party who could have guarded himself against loss by bargaining for certain contract terms or by insuring against possible loss.⁶⁴ Therefore, courts frequently construe contractual silence as an allocation of risk, concluding that either party could have expressly conditioned performance upon the nonoccurrence of a foreseeable contingency.⁶⁵ Absolute unforeseeability, however, may not always be required for a successful impossibility, impracticability, or frustration of purpose defense. The United States Court of Appeals for the Fourth Circuit, for example, rejected a requirement of absolute unforeseeability stating: "The occurrence . . . must be unexpected but it does not necessarily have to have been unforeseeable. A requirement of absolute non-foreseeability as a condition to the application of the doctrine would be so logically inconsistent that in effect it would nullify the doctrine."⁶⁶

Because it is almost always foreseeable that costs of performance may fluctuate

61. The text of the UCC's impracticability provision, UCC § 2-615, does not mention foreseeability except to the extent that the contingency must have been one for which nonoccurrence was a basic assumption of the parties. U.C.C. § 2-615 (1978). However, comment 1 to § 2-615 apparently requires the unforeseeability of a subsequent event to afford excuse under the Code. "This section excuses . . . where . . . performance has become commercially impracticable because of *unforeseen* supervening circumstances not within the contemplation of the parties at the time of contracting" U.C.C. § 2-615 comment 1 (1978) (emphasis added).

Eliminating any requirement of unforeseeability that courts may have imputed to § 2-615 has been suggested. See Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law*, 72 Nw. U.L. REV. 1032, 1038 (1978).

62. Duesenberg, *supra* note 15, at 42. Courts have emphasized the importance of foreseeability. See, e.g., *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975); *Maple Farms v. City School Dist. of Elmira*, 76 Misc. 2d 1080, 352 N.Y.S.2d 784 (Sup. Ct. 1974); *Record Corp. v. Logan Constr. Co.*, 22 Pa. D. & C.3d 358 (1982) (labor strike at defendant's company did not meet courts "test of foreseeability" when labor strike could have been foreseen). But see *West Los Angeles Inst. for Cancer Research v. Mayer*, 366 F.2d 220, 229 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967); *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966) ("Foreseeability or even recognition of a risk does not necessarily prove its allocation.").

63. Restatement (Second) of Contracts § 261 states:

If the supervening event was not reasonably foreseeable when the contract was made, the party claiming discharge can hardly be expected to have provided against its occurrence. *However, if it was reasonably foreseeable, or even foreseen, the opposite conclusion does not necessarily follow.* Factors such as the practical difficulty of reaching agreement on the myriad of conceivable terms of a complex agreement may excuse a failure to deal with improbable contingencies.

RESTATEMENT (SECOND) OF CONTRACTS § 261 comment c (1979) (emphasis added).

64. See *supra* notes 51 & 52.

65. This seems to be an application of the older doctrine of impossibility set forth in *Paradine v. Jane*, 82 Eng. Rep. 897 (K.B. 1647), discussed *supra* at note 20.

66. *Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094, 1100-01 (4th Cir. 1987). The circuit court maintained:

After all, . . . practically any occurrence can be foreseen but whether the foreseeability is sufficient to render unacceptable the defense of impossibility is "one of degree" of the foreseeability and whether the non-occurrence of the event was sufficiently unlikely or unreasonable to constitute a reason for refusing to apply the doctrine. And that is the rule which we think accords with modern reasoning of the doctrine as an equitable doctrine and is the one we approve.

Id. at 1101-02. See also *supra* note 62 and accompanying text.

after contract formation, courts that adopt a foreseeability test in assigning risk of loss have placed the burden of unprofitable market activity on parties who agreed to certain price terms. A number of decisions consistent with *NIPSCO* rely upon the presumably explicit allocation of risk to the buyer or seller inferred from an obligor's failure to protect himself by not insisting on a price ceiling or floor or by assenting to a fixed-price contract. In *Publicker Industries v. Union Carbide Corp.*,⁶⁷ the inclusion of a ceiling on the contract price provided the basis for a determination that the seller impliedly assumed the risk of future price increases.⁶⁸ A failure to condition a contract for the sale of fuel on a particular price for the commodity similarly undermined a claim of impossibility in *Eastern Air Lines, Inc. v. Gulf Oil Corp.*⁶⁹ These cases are representative; courts are often unsympathetic to defendants' contentions that unexpected prices or costs constitute unforeseeable events against which the parties should not have been required to guard.⁷⁰

Theories focusing on the foreseeability of events have also been employed when parties contract in an arena of abnormal risk.⁷¹ Here, events that could not have been foreseen at contract formation may arise subsequent to the agreement, yet may be insufficient to excuse performance if contracting parties were undertaking unusually large risks in originally assuming their obligations. Acting within a "penumbra of risk" may thus be itself an assumption of risk of later contingencies.⁷² The United States District Court for the Eastern District of Virginia in *In re Westinghouse*⁷³ penalized parties who had contracted in "conscious ignorance" of possible contingencies: the court credited to the defendant an assumption of risk for *any* subsequent

67. 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D. Pa. 1975) (ceiling on the contract price implied that risks of increase in price would be borne by seller).

68. *Id.* But see *Freidco of Wilmington, Del. v. Farmers Bank*, 529 F. Supp. 822 (D. Del. 1981) (discussing the presence of a price cap and rejecting the argument that the cap operates to assign risk under all circumstances).

69. 415 F. Supp. 429 (S.D. Fla. 1975).

70. *See, e.g., Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App. 1979) (performance in accordance with requirements expressly stated in the contract was required although drastic increases in the cost of performance were experienced), *cert. denied*, 441 U.S. 865 (1979).

71. *See, e.g., Eastern Air Lines*, 415 F. Supp. at 441-42 (failure to condition contract on specific prices undermined claim for excuse); *Scullin Steel Co. v. PACCAR, Inc.*, 708 S.W.2d 756 (Mo. Ct. App. 1986) (failure to exclude noncancellation provision precluded impracticability defense), *appeal after remand*, 748 S.W.2d 910 (Mo. Ct. App. 1988).

72. *See, e.g., United States v. Wegematic Corp.*, 360 F.2d 674, 676-77 (2d Cir. 1966) (computer supplier acted in penumbra of risk when it contracted for construction of innovative computer system); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440 (E.D. Va. 1981) (entering long-term contract in nuclear industry at time when industry's future was uncertain precluded impracticability defense). *Cf. ALCOA*, 499 F. Supp. 53 (W.D. Pa. 1980). In *ALCOA*, the parties' attempt to limit risk within a "penumbra of uncertainty" defeated the opposing party's claim that *ALCOA* acted in conscious ignorance of risks. The *ALCOA* court suggested:

Once courts recognize that supposed specific values lie, and are commonly understood to lie, within a penumbra of uncertainty, and that the range of probability is subject to estimation, the principle of conscious uncertainty requires reformulation. *The proper question is not simply whether the parties to a contract were conscious of uncertainty with respect to a vital fact, but whether they believed that uncertainty was effectively limited within a designated range so that they would deem outcomes beyond that range to be highly unlikely.* In this case the answer is clear. Both parties knew that the use of an objective price index injected a limited range of uncertainty into their projected return on the contract. . . . Both consciously undertook a closely calculated risk rather than a limitless one. Their mistake concerning its calculation is thus fundamentally unlike the limitless conscious undertaking of an unknown risk which *Essex* now posits.

Id. at 70 (emphasis added).

73. *Westinghouse*, 517 F. Supp. at 440.

event, however unexpected its occurrence might have appeared at the inception of the agreement.⁷⁴ Westinghouse's willingness to bind itself to a long-term contract in the infant nuclear energy industry operated as an assumption of risk of increased costs that ultimately resulted in losses greater than one hundred million dollars.⁷⁵ On appeal, however, the Fourth Circuit recognized Westinghouse's impossibility defense. Since impossibility in *Westinghouse* was due to the federal government's unforeseeable discontinuance of reprocessing services for commercial nuclear power plants, the court relieved Westinghouse from its reprocessing contract.⁷⁶ In discussing the government's attempts to induce commercial investment in the nuclear arena by reducing risks for commercial actors,⁷⁷ the court of appeals indicated that Westinghouse had not acted in conscious ignorance of extreme risks, but instead had unfortunately relied on government promises.

B. *The Need for a Totality of Circumstances Test to Assess Assumption of Risk*

In the *NIPSCO* decision, Judge Posner noted that because price changes are always foreseeable in long-term contracts, any supply contract that fails to protect a party from unprofitable market fluctuations constitutes an explicit assumption of risk and prohibits the application of the impossibility defense.⁷⁸ While advantages do exist in effectively limiting the scope of the court's assumption of risk review to the existence or nonexistence of a price term in a long-term contract, the costs of such analysis are too great to justify its use. Arguably, an approach such as Judge Posner's enhances judicial economy and promotes outcome predictability.⁷⁹ A limited examination, focusing only on certain contractual provisions, may simplify decisionmaking and may conserve both courts' and litigants' resources. The inherent inflexibility of the court's review may also make results of litigation more consistent. Parties might more accurately predict outcomes of potential litigation and plan in accordance with anticipated rulings before entering into contractual relationships. These are possible benefits of judicial examination that is limited to whether certain price terms are included in a contract and that is undertaken to determine how contracting parties intended to assign particular risks.

Notwithstanding these benefits, a court's failure to analyze all circumstances surrounding contract formation ultimately disserves commercial actors. A more realistic determination of which party assumed the risk of an event emerges from a comprehensive analysis of the environment embracing the creation of a contract. In

74. *Id.* at 458. The district court in *Westinghouse* noted the distinction made in *ALCOA*, 499 F. Supp. at 70, indicating that there is "an important difference between conscious and unconscious ignorance of material fact." *Id.* The *Westinghouse* opinion stated that as to the facts before it, "there can be no doubt that the parties entered [their] . . . contract in a state of 'conscious ignorance.'" *Id.*

75. *Id.* at 448.

76. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1574 (1988). In *Florida Power*, the court found on the same facts as *Westinghouse* "a textbook illustration of the circumstances warranting the application of the doctrine of impracticability/impossibility of performance as a valid excuse for breach of a contract." *Id.* at 265.

77. *Id.* at 246-47.

78. *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986).

79. *See, e.g., Halpern, supra* note 15, at 1164 n.174 and accompanying text.

reviewing impossibility, impracticability, and frustration of purpose claims, the foreseeability of the contingency, the nature and purpose of the contract, the course of bargaining, and the ability to insure against loss should all be considered in discerning party intent. Additional factors unique to certain contractual situations may also provide insight into what risks of performance the participants in fact assumed.⁸⁰ In contrast, a more restricted analysis ignores commercial reality, places burdens on contracting parties, and even deters some individuals from undertaking any obligation whatsoever. It may also fail to conserve any significant amount of judicial resources.

Fears that expanding review will waste judicial resources may be overstated. Because impossibility defenses are often pled as a part of complex litigation, courts already may need to review all the circumstances surrounding contract formation to assess the validity of other claims such as mistake,⁸¹ warranty, or breach of contract.⁸² Frivolous impossibility claims would be deterred if courts treated the presence of a fixed-price contract or a particular pricing provision as a rebuttable presumption that risk had been accordingly assigned. Moreover, if courts allowed commercial impracticability defenses only when the claiming party could show by clear and convincing evidence that the intent of the parties was *not* to assign the risks of certain events, many meritless suits would be defeated.⁸³ Finally, courts are always free to eliminate frivolous impossibility claims by imposing sanctions against a party presenting such a claim⁸⁴ or to grant summary judgment against the pleading party. Under the rebuttable presumption standard suggested, a court would grant summary judgment when no reasonable person could find that the evidence introduced by the claiming party clearly and convincingly outweighs an initial

80. In a thorough review of the environment surrounding contract formation, the district court in *ALCOA*, 499 F. Supp. 53 (W.D. Pa. 1980), explored the relationship of the contracting parties, the event triggering losses for defendant, and the parties' attempt to limit faulty prediction of events. Judge Teitelbaum found that even though ALCOA had not provided a price floor provision in its contract with Essex, ALCOA had not assumed the risk of an oil embargo that ultimately inflated the cost of performance. *Id.* at 66-67. After examining the totality of circumstances existing at the time of contracting, the district court found there had been no allocation of such risk:

In the context of the formation of the contract, it is untenable to argue that ALCOA implicitly or expressly assumed a limitless, if highly improbable, risk. On [the] . . . record, the absence of an express floor limitation can only be understood to imply that the parties deemed the risk too remote and their meaning too clear to trifle with additional negotiation and drafting.

Id. at 69. The outcome in the *ALCOA* case has been criticized, but regardless of whether the facts of the case supported Teitelbaum's finding that ALCOA should benefit from judicial reformation of the contract, the assumption of risk analysis was reasonable and cognizant of commercial reality. For a thorough discussion of the *ALCOA* case and its impact on commercial impracticability, see Halpern, *supra* note 15. See also Dawson, *supra* note 15; *Court-Imposed Modifications*, *supra* note 15.

81. See, e.g., *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 51 Wash. App. 484, 754 P.2d 139 (court also reviewing mistake claims), *review granted*, 11 Wash. 2d 1012 (1988).

82. *Republic Floors of New Engl., Inc. v. Weston Racquet Club, Inc.*, 25 Mass. App. 479, 520 N.E.2d 160 (1988) (claims asserted included warranty and breach).

83. Introduction of evidence tending to prove that the initial presumption is inappropriate might be affected by the parol evidence rule. For example, in fixed-price contracts or in those contracts in which a price formula was used, the presence of an integration clause might bar the admission of evidence that otherwise might have rebutted the presumption that all risks were assigned by the agreement. In this case, the rebuttable presumption would operate more as a conclusive presumption and commercial impracticability and frustration defenses would probably fail.

84. FED. R. CIV. PROC. 11.

presumption that the risks of a subsequent event were assigned by explicit contract provisions.⁸⁵

Given the courts' capacity to expunge most frivolous impossibility claims in the early stages of litigation, the absence of a contract term should not constitute conclusive proof that the parties intended particular risk assignment. Indeed, limited extrapolation to discern party intent exercises the fiction that parties contemplate all risks associated with performance to attach based upon the inclusion or the omission of a price provision. Sometimes, the assignment of risk in such a manner is the purpose of the agreement. But under the onus of a conclusive presumption, allocation of risk occurs when the parties contract, even if the occurrence of a particular event was rather unlikely and the omission of a term expressly charging a party with related risks of performance did not represent affirmative risk assignment.

Certainly, the existence of certain price terms may be highly probative of the parties' attempts to apportion risks at contract formation; however, Judge Posner's summary treatment is nevertheless inappropriate because it fails to accommodate the intrinsic complexity of commercial practice. The rationale for expanding contractual defenses to include notions of commercial impracticability as well as those of objective impossibility is to align the law with market realities.⁸⁶ Implying from the absence of a pricing condition that the parties intended the buyer to assume all risks of increased prices, as *NIPSCO* and other cases have posited,⁸⁷ does not adequately reflect the process by which buyers and sellers contract.⁸⁸ Indeed, contracting parties may remain intentionally silent about complex issues under the impression that, if problems arise, "attorneys will sort things out."⁸⁹ Parties may also find it inefficient to dicker over every possible contingency, especially if its occurrence is unlikely. Even where parties do not arrive at a meeting of the minds as to the allocation of risks, for example, when their dickering proves fruitless, resultant contractual silence might nonetheless lead to court-extrapolated assigned assumption of risk under Judge Posner's analysis.⁹⁰

The failure to employ a totality of circumstances test to determine assumption of risk not only fails to appreciate the complexity of the marketplace,⁹¹ but as a

85. FED. R. CIV. PROC. 56. See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("Motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.").

86. See generally Gillette, *supra* note 15, at 534; Prance, *supra* note 15, at 477; *Excusing the Impracticable*, *supra* note 15, at 591.

87. See *supra* note 71.

88. See, e.g., *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966) ("Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy."); Prance, *supra* note 15, at 486.

89. For example, while both parties to shipping contracts understood that the Suez Canal might be closed, neither inserted terms in their contracts with the understanding that, if shipments had to be made via the Cape of Good Hope, "they would leave it to the lawyers to sort out." *Ocean Tankers Corp. v. V/O Sovfracht (The Eugina)*, 2 Q.B. 226, 233-34 (1964), quoted in Gillette, *supra* note 15, at 536-37 n.55.

90. For a discussion of contractual silence and court assigned assumption of risk, see Gillette, *supra* note 15.

91. For an economic analysis of efficiency and contract, see Posner & Rosenfield, *supra* note 15. Judge Posner acknowledges that parties might *not* contract around rules of contract law even if the parties believed those rules inefficient or inappropriate when they negotiated: "[T]ransaction costs [or the costs of 'contracting around' contract law] may . . . outweigh the gains from a more efficient rule." *Id.* at 89.

consequence, it also burdens those who wish to enter into contractual relationships. Indeed, contract formation in certain areas of commercial activity may effectively be precluded if a totality of circumstances test is not applied. Requiring a party to bargain for—indeed, to insist upon—the inclusion of contract provisions that guard against almost all risks of performance results in great inefficiencies. Economic resources are wasted by the negotiation of terms that reasonable parties might otherwise find superfluous but that are nonetheless dickered over out of fear of later improvident performance. For example, it can usually be expected that contracting parties will include clauses in contracts that address events that are sufficiently foreseeable and probable to warrant discussion during contract negotiation. After reviewing the totality of circumstances surrounding contract formation, a court could reasonably conclude that the failure to bargain for such a price term given the foreseeable need to address its subject matter operates as an implicit risk assignment.

Without a totality of circumstances test, however, a court's risk assessment is identical whether or not the associated contingency was so unforeseeable or so unlikely to occur that it did not justify circumspection during contract negotiations. For instance, in *Westinghouse*,⁹² the expectation of the parties was clearly that the government would continue its assistance in the commercial nuclear energy field. The district court was willing to award millions of dollars in damages for breach because Westinghouse failed to include a clause in its contract safeguarding the company against possible cessation of government aid.⁹³ The appellate court disagreed, failing to find that the contract necessarily reflected an intent to assign risk under these circumstances. Instead, the Fourth Circuit looked to the circumstances surrounding contract formation and allowed defendant's impracticability claim.⁹⁴

As the court of appeals reasoned in *Westinghouse*, it seems inequitable to expect parties to bear the consequences of failing to provide for unpredictable or unlikely occurrences simply because a reviewing court refuses to expand its factual inquiry. When courts require parties to adhere to contractual obligations notwithstanding the occurrence of unexpected circumstances, often the result is to penalize a "non-negligent" party. Specifically, if a reasonable contracting party would not find it necessary to dicker over an excusing clause, it is harsh to impose the burden of performance regardless of the effects of an unusual happening merely because an excusing clause was omitted.⁹⁵ Moreover, the performance bargained for will not always be performance that a reasonable person would have proposed if the subsequent disruptive event had been somewhat predictable when the contractual relationship was created. Requiring performance under unexpected circumstances

92. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440 (E.D. Va. 1981).

93. *Id.* at 457.

94. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 264–65 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1574 (1988). *See also supra* notes 73–77 and accompanying text.

95. Allowing a party successfully to assert impossibility, impracticability, or frustration of purpose notwithstanding that party's failure to provide for protective contract clauses does not necessarily encourage sloppy negotiations. When parties have not addressed a particular issue during negotiation, sensibly believing it irrelevant, the omission of a related exculpatory contract provision is not necessarily the result of unsophisticated or careless negotiation and denying impossibility claims in these situations will not create a disincentive to cautious contracting.

could result in a windfall to the opposing party.⁹⁶ Indeed, concern over the windfall that buyer Essex Group would receive if an aluminum supply agreement was not set aside was expressed in *ALCOA*.⁹⁷

Finally, without a totality of circumstances test, formation of contracts may prove too burdensome or risky to undertake at all. Should one party fail to speak to an unlikely event, he may, absent any real negligence, suffer the risks of its occurrence and bestow unexpected benefits upon the other promisor. Such an outcome is particularly likely in areas of commercial activity in which the events affecting performance are in a state of constant flux. Even in these areas, parties may wish to bind themselves, contemplating performance to be in accordance with reasonable expectations about the future. A limited analysis similar to that found in Judge Posner's *NIPSCO* decision, however, may dissuade contract formation when parties fear that the obligations they originally intended to assume may be expanded by judicial intervention and additional risks perhaps allocated after terse review of contract provisions alone.

IV. CONCLUSION

A review of the history of contractual excuse relating to impossibility, impracticability, and frustration of purpose suggests a continuing aversion to previously wooden application of those doctrines. The *NIPSCO* decision illustrates the difficulties courts encounter while attempting to make judicial authority reflect the growing complexity of the marketplace. In refusing to look beyond the contract and its price terms in his analysis of assumption of risk, Judge Posner limits the usefulness of the impossibility, impracticability, and frustration of purpose defenses. Instead of narrowing the scope of judicial review of contractual relationships when a party pleads excuse to an obligation, a more exhaustive analysis of circumstances surrounding the agreement should be conducted. Only from a study of the totality of circumstances that embraced contract formation can courts determine when, in situations created by a rapidly changing commercial environment, parties intended to be bound.

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96. While commentators have suggested that judicial remedies available under the defense of commercial impracticability should include reformation of the original contract, judicial adjustment of contractual obligation remains a disputed topic. See, e.g., Goldberg, *supra* note 15; Halpern, *supra* note 15, at 1178 ("For the present, the context should remain one of 'excuse,' an all-or-nothing solution, however unsatisfying that may be."); Trakman, *supra* note 15; Comment, *Relief from Burdensome Long-Term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*, 47 Mo. L. REV. 79 (1982) (authored by Stephen Hubbard).

97. *ALCOA*, 499 F. Supp. 53, 66 (W.D. Pa. 1980). See also *supra* note 96.

